Office-Supreme Court, U.S.
FILED
MAY 21 1981
ALEXANDER L. STEVAS,

No. 80-1749

In the Supreme Court of the United States

October Term, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

VS.

THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

ALEX A. ALSTON, JR.
(Counsel of Record)
JAMES T. McCAFFERTY, III
THOMAS, PRICE, ALSTON, JONES & DAVIS
519 First National Bank Building
Post Office Drawer 1532
Jackson, Mississippi 39205
(601) 948-6882
HIRAM C. EASTLAND, JR.
CROSTHWAIT, TERNEY, NOBLE & EASTLAND
100 Court Street
Indianola, Mississippi 38751
(601) 887-3412
Suite 109, Capital Towers Building
Jackson, Mississippi 39205
(601) 969-7383
Counsel for Appellees, the State of Mississippi and the Mississippi Public Service Commission

(Other Counsel on Inside Cover)

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

BILL ALLAIN
Attorney General of the
State of Mississippi
BENNETT E. SMITH
Assistant Attorney General
and Attorney for the
Mississippi Public Service
Commission

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

ARGUMENT 3

CONCLUSION 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

CASES

Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979) 6, 7

Davids v. Akers, 549 F.2d 120 (9th Cir. 1977) 8

District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom., EPA v. Brown*, 431 U.S. 99 (1965), *reinstated in part and remanded in part sub nom., District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977) 16

Ex parte Guerra, 94 Vt. 1, 110 A. 224 (1920) 5

Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977), *cert. denied*, 434 U.S. 982 (1977) 15

Fry v. United States, 421 U.S. 542 (1975) 15

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 204 (1824) 5

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 3

Independent Gasoline Marketers v. Duncan, [1980] Energy Mgt. (CCH) ¶ 26,207 (May, 13, 1980) 13

Kentucky Power & Light Co. v. City of Maysville, 36 F.2d 816 (E.D. Ky. 1929) 5

Maryland v. Wirtz, 392 U.S. 183 (1968) 4

Montana-Dakota Utilities Co. v. Johanneson, 153 N.W. 2d 414 (N.D. 1967) 5

Mulherin v. O'Brien, 588 F.2d 853 (1st Cir. 1978) 8

National League of Cities v. Usery, 426 U.S. 833 (1976) 3, 4, 5, 7, 8, 13, 14, 15, 16
Peel v. Florida Department of Transportation, 600 F.2d 1070 (5th Cir. 1979) 15
Pierce v. New Hampshire, 46 U.S. (5 How.) 554 (1847) 5
Public Service Company of North Carolina, Inc., v. FERC, 587 F.2d 716 (5th Cir. 1979), *cert. denied*, 444 U.S. 879 (1979) 15
South Carolina v. United States, 199 U.S. 437 (1905) 5
United States v. Best, 573 F.2d 1095 (9th Cir. 1978) 7
United States v. Ohio Department of Highway Safety, 635 F.2d 1195 (6th Cir. 1980), *cert. denied*, No. 80-1289 (April 20, 1981) 15
United Transportation Union v. Long Island R. Co., 634 F.2d 19 (2d Cir. 1980) 7, 17
Wentworth v. Solem, 548 F.2d 773 (8th Cir. 1977) 17
Weppler v. School Board, 393 F. Supp. 150 (S.D. Fla. 1975), *vacated and remanded for dismissal*, citing *National League of Cities*, 551 F.2d 1055 (5th Cir. 1977) 17

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

United States Constitution:
Article I, Section 8, Clause 3 (Commerce Clause) 3
Article IV, Section 4 (Guarantee Clause) 2, 18
Article VI, Section 2 (Supremacy Clause) 2
Tenth Amendment 2, 4, 15, 16, 17, 18
Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.* 4
Federal Power Act of 1920, 16 U.S.C. § 825m(a), § 825m(b), § 825n, § 825o 10
Miss. Code Ann. § 77-3-39 (Supp. 1980) 9
Miss. Code Ann. § 77-3-87 (Supp. 1980) 10

Power Plant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 13

Public Utility Regulatory Policies Act of 1978 Pub. L. No. 95-617, 92 Stat. 3117-3173, 16 U.S.C. § 2601, *et seq.* 1

Title I, 16 U.S.C. § 2601, *et seq.*:

Section 111(b), 16 U.S.C. § 2621(b) 8
Section 111(c)(2), 16 U.S.C. § 2621(c)(2) 8
Section 111(d), 16 U.S.C. § 2621(d) 8
Section 113(b), 16 U.S.C. § 2623(b) 8
Section 113(c)(2), 16 U.S.C. § 2623(c)(2) 8
Section 115, 16 U.S.C. § 2625 8
Section 116, 16 U.S.C. § 2626 9
Section 121(a), 16 U.S.C. § 2631(a) 9
Section 123(c), 16 U.S.C. § 2633(c) 8, 9-10
Section 133, 16 U.S.C. § 2643 9
Section 133(c), 16 U.S.C. § 2643(a) 14
Section 133(c), 16 U.S.C. § 2643(c) 9

Title II, 16 U.S.C. § 2601, *et seq.*:

Section 210(f), 16 U.S.C. § 824a-3(f) 10
Section 210(g), 16 U.S.C. § 824a-3 ..... 10, 14
Section 210(n)(2)(A), 16 U.S.C. § 824a-3(n)(2)(A) 10

Title III, 16 U.S.C. § 2601, *et seq.* 1

MISCELLANEOUS

National Energy Act (Committee on Energy and Natural Resources print) Publication No. 96-1, 96 Cong., 1st Sess. (1979) 13

S. Rep. No. 95-361, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 8180-8181 14

No. 80-1749

In the Supreme Court of the United States

October Term, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

vs.

THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the United States District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from a final judgment of the United States District Court for the Southern District of Mississippi specifically holding that Title I, Section 210 of Title II, and Title III of the Public Utility Regulatory Policies Act of 1978 (PURPA) (Pub. L. No. 95-617, 92 Stat. 3117-3173, 16 U.S.C. § 2601, *et seq.*) are unconstitutional

and void in that such statutes constitute a direct intrusion on integral and traditional functions of the State of Mississippi and violate the Tenth Amendment, the Supremacy Clause [Article VI, Section 2] and a republican form of government [Article IV, Section 4], all as guaranteed by the Constitution of the United States.

On April 24, 1979, this action was filed by the State of Mississippi and the Mississippi Public Service Commission alleging essentially that PURPA is unconstitutional and void and that the Commerce Clause does not authorize the Congress to regulate the State of Mississippi and the Mississippi Public Service Commission in the manner attempted under PURPA and its regulations.

Both Appellants and Appellees filed Motions for Summary Judgment. At the hearing of the cause Appellees demonstrated to the court that in its first venture into retail rate making, Congress through PURPA presented a convoluted, complicated, confusing and expensive set of requirements and obligations which would impose substantial burdens, both in time and money, on the Mississippi Public Service Commission and which would substantially alter the existing manner in which the Commission performed its retail rate-making function. The court did indeed find that Title I, Section 210 of Title II, and Title III of PURPA constituted a direct intrusion on integral and traditional functions of the State of Mississippi and were, therefore, unconstitutional and void. The court thereupon sustained Appellees' Motion for Summary Judgment and denied Appellants' Motion.

ARGUMENT

The decision of the United States District Court is plainly correct. There has never been a court which has sanctioned such a blatant intrusion into the sovereignty of the states. The Final Judgment of the United States District Court is amply supported by this Court's opinion in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and consequently, the questions presented by this appeal are unsubstantial.

These sections of PURPA plainly invade the separate and independent sphere of state power involved in performing the traditional governmental function of regulating electric and gas utilities. Under the clear authority of this Court, the lower Court was manifestly correct in holding that such an impermissible federal intrusion into the manner in which this State has traditionally performed its function of retail rate making transgresses the bounds of federal authority granted Congress under the Commerce Clause.

It is not the simple regulation of utilities by the Congress to which the State of Mississippi and the lower court object, since it is axiomatic that the Commerce Clause entitles the federal government to regulate intrastate activity which substantially affects interstate commerce. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). However, in the case under consideration, the Act does not regulate utilities or private business. The Act imposes its strictures directly upon the states themselves. The law is now well settled that when Congress seeks to regulate directly the activity of states, "the states as states stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' powers to regulate com-

merce." *National League of Cities v. Usery*, 426 U.S. 833, 854 (1976).

This Court, in *National League of Cities* agreed that assertion of power by Congress over states under the Commerce Clause, if unchecked, would indeed allow "the national court to devour the essentials of state sovereignty." 426 U.S. at 855, quoting from *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J. dissenting).

This limitation upon federal power was specifically enunciated in *National League of Cities*. There, an organization of municipalities challenged the constitutionality of the application of federal wage and hour provisions of the Fair Labor Standards Act (FLSA) to the states and their subdivisions. In concluding that the challenged FLSA provisions violated the Tenth Amendment, this Court developed an analysis for determining just when congressional intrusion into the domain of state government can be tolerated under our Constitution. Using the *National League of Cities* analysis, a court must first determine whether the area of state activity regulated under the auspices of the Commerce Clause, "(i)nvolves an integral and traditional governmental function essential to the separate and independent existence of the states." *National League of Cities*, 426 U.S. at 845, 851. If such a function is implicated, the court then determines whether the contested federal action forces upon the states Congress' choices as to how essential decisions regarding that function are to be made. If so, the federal legislation is unconstitutional and further analysis is unnecessary. *National League of Cities* plainly prohibits Congress from acting "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions . . .", 426 U.S. at 852.

Even where it does not rise to the level of displacing state prerogative, the federal interference with such state functions is still not justified as constitutional unless the Court finds that the interference (1) is occasioned by an extremely serious problem endangering the entire federal system which only "collective action by the National Government might forestall," 426 U.S. at 853; and (2) the means selected are "carefully drafted so as not to interfere with the state's freedom beyond a very limited, specific period of time." 426 U.S. at 853.

Public Utility Regulation Is an Integral, Traditional Function, Essential to Mississippi's Independent Existence As a State

Utility regulation is unquestionably founded upon the police power of the state. *Kentucky Power & Light Co. v. City of Maysville,* 36 F.2d 816, 819 (E.D. Ky. 1929); *Montana-Dakota Utilities Co. v. Johanneson,* 153 N.W.2d 414, 420 (N.D. 1967). The police power, of course, has long been recognized as an inherent power of the states, *Pierce v. New Hampshire,* 46 U.S. (5 How.) 554 (1847), and has been equated with sovereignty itself. *Ex parte Guerra,* 94 Vt. 1, 110 A. 224 (1920). "[I]n its fullest and broadest sense, [the police power has been] reserved to the states," *South Carolina v. United States,* 199 U.S. 437, 454 (1905). As such a fundamental element of statehood, the police power is immune from direct regulation by the federal government acting under the guise of the Commerce Clause. *See, Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 204 (1824), (stating that the commerce power of Congress "implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police").

The Mississippi Public Service Commission ["PSC" hereinafter] has historically been the Mississippi state

commission charged by the state legislature with the state police power function of regulating the utilities, motor carriers, railroads and other common carriers, gas pipelines and distribution systems, and with supervising these operations to insure that such services are properly provided to the citizens of Mississippi. When the PSC's forerunner, the Railroad Commission, was created in 1884, its duties were confined primarily to the supervision and regulation of Mississippi railroads. In 1892, the state legislature noted the continued progress of express, telephone and telegraph activities, and placed these services within the jurisdiction of the Railroad Commission. By 1926, the increasing demand for truck and bus transportation prompted the legislature to place these services under the authority of the Railroad Commission.

In 1938, the name of the Railroad Commission was changed to the Public Service Commission, and the Commissioners, previously appointed, became elected.

In 1956 the legislature placed within the jurisdiction of the PSC the intrastate operation of all utilities: telephone, telegraph, electric, natural gas and water. Since that time the PSC has determined the legality of rates charged by the regulated utilities and has supervised their operation within the State of Mississippi in accordance with its mandate from the Mississippi Legislature.

It cannot be doubted that utility regulation is a traditional, integral state governmental function with which the Congress is forbidden to interfere. *Amersbach v. City of Cleveland,* 598 F.2d 1033 (6th Cir. 1979) enumerates some of the characteristics of a traditional or integral state government function.

(1) The government service or activity benefits the community as a whole and is available to the public at little or no direct expense;

(2) The service or activity is undertaken for the purpose of public service rather than for pecuniary gains;

(3) Government is the principal provider of the service or activities; and

(4) Government is particularly suited to provide the service or provide the activity because of the community-wide need for the service or activity.

598 F.2d at 1037.

Utility regulation clearly contains all the foregoing elements.[1] The Mississippi Public Service Commission is a governmental service or activity which benefits the entire state and is available to the public at little or no direct expense. Furthermore, the Commission is undertaken for the purpose of public service rather than for any pecuniary gain. There is no doubt that government is the principal provider of the service or activity of regulating public utilities and that the state is particularly suited to provide the service because of a statewide need for the service or activity. Indeed in *Amersbach* the court held that the operation of an airport was a traditional governmental function. Furthermore, recent decisions have held that the licensing of drivers [*United States v. Best*, 573 F.2d 1095, 1103 (9th Cir. 1978)] and the power of a state

---

1. Although the Mississippi Public Service Commission has actually regulated electric and gas utilities for only twenty-five years, such regulation is clearly a traditional, integral function of the state when viewed against the historical regulatory background of the PSC and its predecessor, the Mississippi Railroad Commission. Moreover, concepts of what activities are integral and essential are not static, but should respond to the ever-changing needs of the state's citizenry. *See, e.g., United Transportation Union v. Long Island R. Co.*, 634 F.2d 19, 28-29 (2d Cir. 1980) (state-operated railroad held to be an integral governmental function within the meaning of *National League of Cities v. Usery*).

legislative body to adopt and implement procedural rules for itself [*Davids v. Akers*, 549 F.2d 120, 127 (9th Cir. 1977)] are integral governmental functions.

PURPA Unconstitutionally Displaces the State's Freedom to Structure Integral Operations in the Traditional Governmental Function of Utility Regulation

It is clear from the language of *National League of Cities* that a state has an inviolable right to fashion the governmental machinery by which it structures and performs its traditional, integral functions. *See, also, Mulherin v. O'Brien*, 588 F.2d 853 (1st Cir. 1978).

PURPA's potential for disrupting the state's structuring of its utility regulatory policy is self-evident. Title I of the Act deals with retail regulatory policies for electrical utilities. This Act requires the state regulatory authority to consider federally-created rate-making standards and to determine whether those standards should be chosen over those presently employed by the state. § 111(d), 16 U.S.C. § 2621(d); § 113(b), 16 U.S.C. § 2623 (b). The Act contains special rules or definitions by which the state regulatory authorities must consider the standards, § 115, 16 U.S.C. § 2625. Title I also dictates the procedure by which these federal standards are to be considered. § 111(b), 16 U.S.C. § 2621(b). If the federal standards are not adopted, the Act requires the state to justify its failure to adopt the standards to the federal government. § 111(c)(2), 16 U.S.C. § 2621(c)(2); § 113(c)(2), 16 U.S.C. § 2623(c)(2). The state must also be ready to defend its decisions in court, since PURPA purports to give standing and the right of appeal in state court to the Secretary of Energy and to the electricity consuming public at large. § 123(c), 16 U.S.C. § 2633(c).

Title I also imposes burdensome paperwork on the state regulatory authority. This Act requires the state regulatory authorities to make annual reports "to the Secretary, in such manner as the Secretary shall prescribe." § 116, 16 U.S.C. § 2626. Additionally, it requires the regulated utilities to "periodically gather information under such rules (promulgated by the Commission) as the Commission determines necessary to allow determination of the costs associated with providing electric service." § 133, 16 U.S.C. § 2643. Title I requires the state regulatory authority to file "the information gathered pursuant to this Section and make such information available to the public in such form and manner as the Commission shall prescribe." § 133(c), 16 U.S.C. § 2643(c). The foregoing provisions of PURPA would reduce the state regulatory authority to little more than a file clerk for FERC.

The extensive intervention rights conferred by PURPA will, of course, lengthen the period of time required for the regulating process. This delay factor poses a very real threat to the Mississippi Public Service Commission, since it is required to complete any determination of rates within six months of the filing by a utility of a notice of rate change. Miss. Code Ann. § 77-3-39 (Supp. 1980). The delay problem is exacerbated by PURPA's conference upon the intervenor of the right to raise "other concepts which contribute to full achievement of the purposes of this title." § 121(a), 16 U.S.C. § 2631(a). The Act's potential for disruption of the regulation process is limited only by the intervenor's imagination.

Federal intrusion does not end with the above obligations since the Act provides for a right of appeal to any person including the Secretary of Energy from a determination made under the Act. § 123(c), 16 U.S.C. § 2633

(c). This provision obviously multiplies the coercive impact of the government's presence in the state proceedings so as to allow the federal government the right to attempt to overthrow the state regulatory determinations.

PURPA diminishes the state's treasury as well as its prerogative. The Mississippi Public Service Commission presently is funded by a tax raising $1,000,000.00 per year. Miss. Code Ann. § 77-3-87 (Supp. 1980). The uncontradicted proof before the lower court was that compliance with PURPA would necessitate a Mississippi Public Service Commission staff increase of at least five executive and three secretarial employees. The cost of submitting the required proposal report to DOE alone would exceed $360,000.00.

Under Title II of PURPA the Federal Power Act was amended to provide that the Federal Power Commission [now FERC] shall provide rules to encourage cogeneration and small power production. § 210(g), 16 U.S.C. § 824a-3. The Act further provides that each state regulatory authority *shall* implement the federal rule for each electric utility for which it has rate-making power. § 210(f), 16 U.S.C. § 824a-3(f). Furthermore, FERC is given express power and authority to enforce this requirement against a state regulatory agency under the provisions of the Federal Power Act, § 210(n)(2)(A), 16 U.S.C. § 824a-3n(2)(A). Under the Federal Power Act, FERC has authority to enforce this provision by injunctive proceeding [16 U.S.C. §825m(a)], by mandamus commanding any person to comply with this provision [16 U.S.C. § 825m(b)] or by severe forfeitures [16 U.S.C. § 825n] and penalties [16 U.S.C. § 825o].

Title III of PURPA tracks the same language as Title I but deals only with the regulation of retail policies for natural gas utilities. The obligations, burdens and

federally mandated procedures placed on the Mississippi Public Service Commission under Title III are almost identical to the obligations and burdens placed on the Commission under Title I. For this reason, and to avoid prolixity, Appellees will not discuss each of the sections under Title III which, like Title I discussed hereinabove, disrupt the manner in which the State of Mississippi structures its utility regulations.

Such interference with state regulatory functions will not be simply an incidental result of PURPA; to the contrary, federal intrusion is the Act's goal. There should be no doubt that Congress intended to use the authority conferred by PURPA over the states. The Mississippi Public Service Commission has already been reprimanded for failing to adhere to federal policy under PURPA.

Manifestly PURPA will have a substantial impact on the PSC. It blatantly coerces Appellees into adopting federal standards on rate making and employing state employees and expending substantial funds. It interferes with the utility rate-making function of the PSC by forcing consideration of standards and by mandating the use of certain procedural rules. The Act brazenly supplements state law and gives standing to the Secretary of Energy and third parties to intervene in rate-making proceedings. It allows the Secretary of Energy to intervene in judicial appellate proceedings as amicus curiae. It provides standing and a right to appeal in state courts from certain Public Service Commission decisions to a class of customers. It requires that the Commission implement certain rules to encourage cogeneration and subject the Public Service Commission to severe penalties if they fail to do so. Certainly, this list is not exhaustive, and as PURPA is implemented and all of its rules and regulations are forced upon the PSC, one can easily envision almost complete control over the PSC.

The Mississippi Public Service Commission must be free to make the considered policy choices regarding how it wishes to operate procedurally and substantively in order to perform its governmental function of regulating utilities under the mandate of the State of Mississippi. The Act clearly displaces the Commission's policy choices regarding its system for performance or manner in which it structures its delivery of governmental services in regulating utilities. Contrary to the policies of the PSC, PURPA gives the federal government a broad right to directly involve itself in the proceedings of the PSC and gives the federal government the right to attempt to overthrow the decisions of the state elected PSC through appeal.

It is obvious from this discussion of the facts that PURPA substantially impairs the state's ability to function effectively in this federal system and it directly displaces the state's freedom to structure integral operations in areas of traditional governmental functions. PURPA is structured so as to require Mississippi to administer its Public Service Commission in a manner mandated by the terms of that Act. The policy-making and rate-making roles, as well as the administrative characteristics of the Mississippi Public Service Commission, will be seriously affected by the commands imposed upon it by PURPA.

The State of Mississippi and its people will be deprived of the ability to make certain governmental decisions which are judicial and legislative in character. Indeed, PURPA interferes with the most sovereign of states' attributes. The mandates of this Act usurp the quasi-legislative and quasi-judicial roles of the Mississippi Public Service Commission as well as state legislative and state judicial decision-making. These attributes are essential to the existence of states as states. The lower court very properly recognized that such federal interference cannot be tolerated if fed-

eralism, as we know it today, can continue to exist and states are allowed to function in this federal system. This was essentially the holding in *National League of Cities,* and also the holding of the lower court in the instant case on even stronger facts of direct federal interference on an essential governmental function of the State of Mississippi.

PURPA Is Not Designed to Forestall a Serious National Problem

Before Federal intrusion into the State domain is ever justified, there must be some extreme emergency requiring "collective action by the national government . . . ." *National League of Cities,* 426 U.S. at 853. An examination of executive and congressional statements concerning PURPA's role in our nation's energy policy plainly reveals that PURPA is neither designed nor expected to "forestall" the "extremely serious problems" of our nation's dependence on foreign oil. For instance, in estimating the "Import Savings" of PURPA in the reference material distributed by the Department of Energy (DOE), the DOE designates a savings of anywhere from *zero* to 160,000 barrels of oil per day by 1985. *See,* the National Energy Act (Committee on Energy and Natural Resources print) Publication No. 96-1, 96 Cong., 1st Sess. (1979), p. 13. Even if the maximum 160,000 barrels of oil per day were conserved under PURPA, the impact on the overall energy policy of this country would be slight. In *Independent Gasoline Marketers v. Duncan,* [1980] CCH ENERGY MGT. ¶ 26,207 (May 13, 1980), the Secretary of Energy acknowledged that a 56,000 to 100,000 barrels per day savings in gasoline line consumption would have only a slight effect on oil imports. *Independent Gasoline Marketers,* at n. 4. Moreover, Congress recently deleted a provision from the Power Plant and Industrial Fuel Use Act of 1978 which would have saved

160,000 barrels of oil per day purely in the interest of allowing utilities "some flexibility." S. Rep. No. 95-361, 95th Cong., 2d Sess. (1978), p. 35; reprinted in 1978 U.S. Code Cong. 8 Ad. News 8180-8181. Certainly a state's interest in its sovereignty should be accorded the same consideration as a utility's interest in "flexibility."

Accordingly, there is clearly no emergency need for the provisions of PURPA found to be unconstitutional by the lower court. PURPA cannot guarantee the saving of one barrel of oil, so it can hardly be expected to "forestall" the problem of our nation's dependence on foreign oil.

PURPA Interferes With Protected State Functions Beyond the "Very Limited, Specific Period of the Time" Allowable Under the Tenth Amendment

Assuming, arguendo, that the provisions of PURPA were designed to forestall a legitimate, national emergency, PURPA still could not pass constitutional muster for the reason that the changes wrought by PURPA are not confined to the "very limited, specific period of time" sanctioned by *National League of Cities,* 426 U.S. at 853. Rather, the PURPA provisions would cause continuing interference with Mississippi's regulatory functions. For instance, the intervention rights conferred by the Act upon the consuming public and the Secretary are not limited to any particular time frame. Section 133(c) [16 U.S.C. § 2643(a)] imposes a continuing filing and reporting duty upon the state regulatory authority. The time period during which the state will be required to implement FERC regulations pursuant to PURPA Section 210(g) (16 U.S.C. § 824a-3) is likewise unspecified. Plainly, the indefinite duration of the Act alone causes PURPA to fall far short of the constitutional requirements articulated in *National League of Cities.*

Appellants' Cases Clearly Have No Application to the Case at Bar

Appellants have cited a number of cases wherein federal regulation ostensibly affecting the states has been found to be constitutionally valid. In such cases, however, the legal and factual questions presented have differed significantly from *National League of Cities* and the present case. For instance, in *Fry v. United States*, 421 U.S. 542 (1975), and *Peel v. Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979), the federal action at issue did not displace any state choices; to the contrary, the federal action simply maintained the status quo.

Similarly, in *United States v. Ohio Department of Highway Safety*, 635 F.2d 1195 (6th Cir. 1980), *cert. denied*, No. 80-1289 (April 20, 1981), and *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977), *cert. denied*, 434 U.S. 982 (1977), the environmental plans sought to be enforced against the states had been created or adopted by the states without protest. The case at bar presents quite a different situation. Unlike the state in *Friends* and *Ohio Department of Highway Safety*, the Mississippi PSC has challenged the legitimacy of PURPA from the inception of the Act. It cannot be disputed that the PSC has acted diligently to safeguard its rights in this cause.

Neither does *Public Service Company of North Carolina, Inc. v. FERC*, 587 F.2d 716 (5th Cir. 1979), *cert. denied*, 444 U.S. 879 (1979), have any application to the present case. That case involved regulation of the state as a gas producer, not as a state. Since a traditional state function was not involved, the Tenth Amendment clearly was not implicated. 587 F.2d at 721.

Applicable Cases

The question presented by PURPA is much more closely related to the problems presented in *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom., EPA v. Brown*, 431 U.S. 99 (1965), *reinstated in part and remanded in part sub nom., District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977). In *Train*, the United States Court of Appeals for the District of Columbia Circuit held that the EPA Administrator could not constitutionally compel a state to administer "the details of the regulatory scheme promulgated by the Administrator." 521 F.2d at 992.

The facts in *Train* are strikingly similar to the present case. Section 210 of PURPA, for example, would allow the federal government to do exactly what the court in *Train* said the federal government could not do: "commandeer the regulatory powers of the States, along with personnel and resources, for use in administering and enforcing a federal regulatory program . . . ." 521 F.2d at 991.

The case at bar presents a more compelling need for the protection of the Tenth Amendment than have any of the other cases discussed herein. In the instant case, the federal government is directly tampering with the state's performance of an integral governmental function, not just some practice incident to that function. Indeed, an examination of the state functions and activities being commandeered in the instant case reveals a much more blatant affront to the "separate and independent existence" of the states than the issues considered in *National League of Cities*. In *National League of Cities*, the issue was whether states and municipalities were subject to the wage and hour provisions of the FLSA. As serious as the FLSA

threat was to the states, the harm to state sovereignty was indirect. The danger was that increased payroll expenses would force the states to curtail traditional functions. There was no actual dictating of state policy (other than wage and hour requirements) by the federal government. The same is true of *Wentworth v. Solem*, 548 F.2d 773 (8th Cir. 1977), wherein the court ruled that a state could not be required to pay state convict workers the federal minimum wage. *See, also, Weppler v. School Board*, 393 F. Supp. 150 (S.D. Fla. 1975), *vacated and remanded for dismissal* citing *National League of Cities*, 551 F.2d 1055 (5th Cir. 1977).

In the instant case, however, the harm is not just a potential one; rather, the danger is direct. Rather than simply altering state wage and hour laws of state employees, PURPA goes directly to the regulatory decision makers and imposes a barrage of federal obligations and responsibilities. Moreover, for the first time, Congress has enacted legislation which specifically provides that the Act supplements state law. There is not just a possibility that the traditional structure of state government will change; there is a certainty. PURPA's displacement of state prerogative is impermissible under the Tenth Amendment.

Moreover, the state function with which PURPA interferes is even more important than those functions protected from federal interference in other cases. For instance, in *United Transportation Union v. Long Island R. Co.*, 634 F.2d 19 (2d Cir. 1980), a state-owned railroad was held to be immune from federal labor legislation. If operating a railroad company, an enterprise normally conducted privately for profit, is protected by the Tenth Amendment when conducted by a state, certainly the activities of the Mississippi Public Service Commission merit similar deference.

From the foregoing discussion, it is abundantly clear that Title I, Section 210 of Title II and Title III of PURPA are unconstitutional and void. These statutes constitute a direct intrusion on an integral and traditional function of the State of Mississippi and violate both the Tenth Amendment of the United States Constitution and a republican form of government as guaranteed by Article IV, Section 4 of the Constitution. The lower court was manifestly correct in so holding.

CONCLUSION

We respectfully submit, therefore that the Appellants present no substantial question for the decision of this Court, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

ALEX A. ALSTON, JR.
(Counsel of Record)
JAMES T. McCAFFERTY, III
THOMAS, PRICE, ALSTON, JONES & DAVIS
519 First National Bank Building
Post Office Drawer 1532
Jackson, Mississippi 39205
(601) 948-6882
HIRAM C. EASTLAND, JR.
CROSTHWAIT, TERNEY, NOBLE & EASTLAND
100 Court Street
Indianola, Mississippi 38751
(601) 887-3412
Suite 109, Capital Towers Building
Jackson, Mississippi 39205
(601) 969-7383
Counsel for Appellees, the State of Mississippi and the Mississippi Public Service Commission

BILL ALLAIN
Attorney General of the
State of Mississippi
BENNETT E. SMITH
Assistant Attorney General
and Attorney for the
Mississippi Public Service
Commission

CERTIFICATE OF SERVICE

I, Alex A. Alston, Jr., one of the attorneys for Appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 19th day of May, 1981, I served copies of the foregoing documents on the several parties hereto by mailing three copies of said document by United States mail, in duly addressed envelope, with postage prepaid, to each of the following persons:

1. Honorable Wade H. McCree, Jr., The Solicitor General, Department of Justice, Washington, D. C. 20530, and Honorable Anthony C. Liotta, Acting Assistant Attorney General, Department of Justice, Washington, D. C. 20530, and Honorable Elliott Schulder, Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, and Kathryn A. Oberly, Esq. and Susan V. Cook, Esq., Attorneys, Department of Justice, Washington, D. C. 20530.

2. Jerome Nelson, Esq., Acting General Counsel, Federal Energy Regulatory Commission, Washington, D. C. 20426, and Jerome M. Feit, Esq., Deputy Solicitor, Federal Energy Regulatory Commission, Washington, D. C. 20426, and Joanne Leveque, Esq., Attorney, Federal Energy Regulatory Commission, Washington, D. C. 20426.

3. Honorable James B. Edwards, Secretary of Energy, Department of Energy, Washington, D. C.

ALEX A. ALSTON, JR.

4. Joshua Green, Esq., P.O. Box 166, Jackson, Mississippi 39205; James K. Child, Esq., P.O. Box 651, Jackson, Mississippi 39205 and Allen R. Hirons, Esq., Suite 950, 1800 Century Boulevard N.E., Atlanta, Georgia 30345.